

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERESA WEIMER)	
Claimant)	
)	
VS.)	
)	
AMERICAN INSULATED WIRE)	
Respondent)	Docket No. 251,348
)	
AND)	
)	
RELIANCE NATIONAL INDEMNITY CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the February 16, 2007 Post-Award Medical Order by Administrative Law Judge (ALJ) Thomas Klein in which the ALJ ordered respondent to provide “medical care” by designating “four qualified physicians” from which claimant is to select one to treat his work-related injury.¹

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, represents the claimant. Stephen J. Jones, of Wichita, Kansas, represents the respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The ALJ failed to list the contents of the record for purposes of this Post-Award matter. Based upon the parties’ submission letters, the record consists of the pleadings contained within the administrative file along with the following:

1. Deposition of Teresa Weimer (03/02/06),
2. Post-Award Medical Hearing (08/09/06),

¹ ALJ Order (Feb. 16, 2007).

3. Deposition of Edward J. Prostic, M.D. (09/27/06),
4. Deposition of Kevin D. Komes, M.D. (12/21/06), and
5. Stipulation regarding the testimony of Brenda Carnes.

ISSUES

The ALJ expressly found that the claimant was entitled to medical care and ordered respondent to provide the claimant with the names of 4 physicians within 10 days so that an authorized treating physician could be chosen. Post-Award attorney fees were deferred for future consideration.

The respondent requests review of this Post-Award Order arguing that the treatment claimant seeks is unrelated to her original injury and that by ordering respondent to designate 4 physicians from which claimant can select the treating physician exceeds the ALJ's jurisdiction. The respondent also takes issue with the ALJ's failure to make specific factual findings as required by K.S.A. 44-510k. Thus, the Post-Award Order should be reversed and claimant's request for further medical treatment should be denied.

Claimant requests that the Board do what the ALJ did not and grant the request to have Dr. Prostic assigned as the treating physician to provide care and treatment related to the work injury with the respondent. Claimant also requests her attorney fees to be paid by the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

The claimant asserted a repetitive injury claim against respondent, complaining of upper extremity complaints and neck pain. After evaluation, she was diagnosed and treated for bilateral carpal complaints, possible cubital tunnel and compression problems in the neck. After a full hearing she was awarded a 19 percent permanent partial impairment to the whole body on August 16, 2002.² That Award also provided for future medical benefits upon proper application but no physician was designated to provide ongoing treatment.

During the course of claimant's treatment for her injury, Dr. Prostic was designated as the treating physician. And in connection with the Regular Hearing, he testified that

² On appeal to the Board, this functional impairment was modified to 23 percent.

even upon her release from treatment (in January 23, 2001), she would require repeat EMG testing if her cubital tunnel symptoms continued.

Following her release, claimant sought no further treatment until November 2, 2005, when she requested respondent provide authorized post-award medical treatment with Dr. Prostic, the previously court-ordered authorized treating physician, for her ongoing bilateral arm symptoms (which she said had continued since her Award) along with her neck and upper back complaints. In particular, she complains of bilateral numbness in her hands, primarily in the ring and little fingers. Respondent refused to authorize treatment with Dr. Prostic. Instead, claimant was sent to Dr. Komes on March 28, 2006.

Dr. Komes examined the claimant and performed a series of tests, including Phalen's, reverse Phalen's and Tinels. While Dr. Komes recognized claimant may well have some sort of carpal tunnel complaints bilaterally *and that repeat nerve conduction studies would be helpful*, he attributed these complaints to subsequent activities and should be filed as a different claim or be taken care of under her private insurance.³ Dr. Komes determined that claimant is in need of no further treatment for *this* claim.

At her lawyer's request, claimant went to see Dr. Prostic on May 5, 2006. Dr. Prostic found that the claimant's problems were the same as those she experienced in 2001 and recommended a third EMG to determine if she was in need of additional medical care for her ulnar nerve symptoms. He further testified that her present symptoms are a natural and probable result of her earlier injury. He explained that claimant had voiced these complaints back in 2000 and following carpal tunnel surgery, her wrist complaints subsided. But her cubital tunnel complaints continued and over time, and have gotten worse. Moreover, he testified that her present job as a night admissions clerk did not, in his view, contribute to this condition as her work activities were quite sedentary and not repetitive in nature. Finally, Dr. Prostic stated that if the results of the EMG were positive, she should have decompressive surgery.

Respondent had a repeat EMG performed on claimant on October 12, 2006. According to Dr. Komes, this report was negative for cubital tunnel syndrome, plexopathy, radiculopathy and peripheral neuropathy.

After reviewing the evidence, the ALJ granted claimant's request for medical care and ordered respondent to provide a list of 4 physicians from which claimant could select one to provide her care. This aspect of the Post-Award Order has pleased neither party. Claimant wants to return to Dr. Prostic while respondent maintains its medical evidence indicates claimant is not suffering from ulnar nerve complaints and that whatever her problem, it is unrelated to her earlier workers compensation claim.

³ Komes Depo., Ex. 1 at 3.

The Board has considered this issue and finds the ALJ's Post-Award Order granting claimant's request for medical treatment should be affirmed. While there is a dispute between the physicians' testimony as to whether claimant's ulnar nerve complaints are a natural and probable cause of her workers compensation injury, the Board finds that Dr. Prostic's testimony is more persuasive. Dr. Komes was not claimant's treating physician and had only limited knowledge about her earlier complaints. Moreover, he seemed intent in his report on assigning liability and providing claimant with legal advice with respect to filing a new workers compensation claim. For these reasons, the Board is more persuaded by Dr. Prostic's testimony and his belief that claimant's present complaints are the same as those expressed back in 2000 albeit more intense and constant in nature. Thus, the Post-Award Order granting claimant treatment is affirmed.

Likewise, the Board declines to reverse the ALJ's decision to order respondent to provide a list of 4 physicians from which claimant can select one to direct her care. While the Act does provide for an ALJ to order a respondent to provide a list of 3 medical providers in connection with a change of physician⁴, the Board finds the ALJ did not exceed his jurisdiction in ordering the designation of 4 physicians. While unusual, this finding does not seem to be so out of the ordinary so as to constitute an abuse of discretion or evidence that the ALJ exceeded his authority. The ALJ has the authority to grant requests for medical treatment intended to cure and relieve the effects of the work related injury.⁵

Respondent also suggests, in passing, that "[t]here must be a change in circumstances in order to support a post-award medical order for treatment where the recommendation remains the same both pre-award and post-award."⁶ While this premise is true, a full examination of *Naff* reveals a situation altogether different than the one at hand.

Naff involved a claimant who was recommended to have surgery but elected not to do so and instead settled the claim. Within a matter of days, claimant then filed a post-award request for the very treatment previously rejected, along with a request for post-award attorneys fees. That claimant's request was denied and the *Naff* Court explained that there had been no change in circumstances sufficient to justify the post-award request. Here, there is a significant passage of time and an increase of symptoms making this a wholly different situation. Thus, respondent's argument is rejected.

Finally, the Board agrees that it would be helpful if the ALJ would make specific findings with respect to claimant's need for treatment. Indeed, the statute compels factual

⁴ K.S.A. 44-510h.

⁵ K.S.A. 44-510k.

⁶ Respondent's Brief at 4 (filed Mar. 13, 2007). Citing *Naff v. Davol*, 28 Kan. App. 2d 726, 20 P.3d 738, rev. denied 271 Kan. 1037 (2001).

findings.⁷ The ALJ's Order merely contains a statement granting the sought-after medical treatment. Nonetheless, the Board finds that the ALJ must have concluded claimant met her evidentiary burdens and that her present complaints are attributable to her underlying workers compensation injury, thus giving rise to an entitlement of medical treatment. In the future, the ALJ is requested to make factual findings and conclusions of law of sufficient detail so as to allow a meaningful review.

As for the request for attorney's fees, the ALJ has yet to rule upon this issue. The Board will remand that portion of the Post-Award Order for further proceedings. The Board will not consider issues that the ALJ has yet to consider.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post-Award Medical Order of Administrative Law Judge Thomas Klein dated February 16, 2007, is affirmed and remanded to the ALJ for consideration of the post-award attorneys fee issue.

IT IS SO ORDERED.

Dated this _____ day of May, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Stephen J. Jones, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

⁷ K.S.A. 44-510k.